Supreme Court, U.S.
FILED
FEB 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

H. LADDIE MONTAGUE
ALAN M. SANDALS
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215-875-3000

ARNOLD LEVIN
HOWARD SEDRAN
LEVIN AND FISHBEIN
320 Walnut Street
Philadelphia, PA 19106
215-592-1500

Attorneys for Petitioner
Big D Building Supply Corp.

DOUGLAS V. RIGLER*
KAPLAN RUSSIN & VECCHI
1218 Sixteenth Street, N.W.
Washington, DC 20036
202-638-0060

LINDA HELLER KAMM
MICHAEL FISCHER
FOLEY & LARDNER
1775 Pennsylvania Avenue, NW
Washington, DC 20006
202-862-5300

JOSEPH E. ZDARSKY
KAVINOKY & COOK
120 Delaware Avenue
Buffalo, NY 14202
716-856-9234

Attorneys for Petitioner
Square D Company

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

25 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	i
I. Recovery Of Damages From Companies Which Violate Both ICC Regulations And The Antitrust Laws Does Not Infringe Upon A Regulatory Plan	3
II. Petitioners Did Not Receive The Rate Protection To Which They Were Entitled	5
III. A Holding That *Keogh* Does Not Immunize Conduct Which Violates A Regulatory Plan Would Pose No Penalty For Carriers Which Comply With Federal Statutes And Regulations	7
IV. Plaintiffs Seek To Recover For Damages Computed According To Accepted Principles of Calculation Under The Antitrust Laws	10
V. The Reed-Bulwinkle Act Of 1948 Granted Express And Limited Immunity Which Obviated And Supplanted The Respondents' Need For *Keogh* Doctrine Protection	11
VI. The *Carnation* Decision Recognizes That Implied Immunity No Longer Applies When Express Statutory Immunity Is Granted	14
VII. The Filed Rate Doctrine Should Not Apply To Affirmatively Fraudulent Conduct Which Violates *Both* The Regulatory Plan And The Antitrust Laws	15
VIII. The Brief of *Amici* American Information Technologies Corp., *et al.*, Poses An Artificial Question And The Brief Is Not Entitled To Any Weight	16
IX. Respondents Were Not Entitled To Rely On *Keogh* As A Basis For Secret Cheating On A Regulatory Plan And, Accordingly, Public Policy Should Not Insulate Them From Recompensing Victims Through Prospective Overruling	18
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 15

Arrow Transportation Co. v. Southern Railway, 372 U.S. 658 (1963) 15-16

Canter v. Detroit Edison Co., 428 U.S. 579 (1976) 6

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966) 4, 10, 14, 15, 19

City of Mishawaka v. Indiana & Michigan Electric Co., 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978) 4

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) 3

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) 3

Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922) ..... *passim*

Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) 4

MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983) 4

In re Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235 (S.D.N.Y. 1980) 10

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 6

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) 3

Southern Motor Carriers Rate Conference v. United States, 105 S.Ct. 1721 (1985) 19

Texas & Pacific Railway v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 15

In re Wheat Rail Freight Rate Antitrust Litigation, 759 F. Supp. 1305 (7th Cir. 1985) 17, 18

Table of Authorities Continued

Page

STATUTES:

Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 *et seq.* ..... *passim*

Sherman Act, 15 U.S.C. §1 *et seq.* ..... *passim*

Shipping Act of 1916, 46 U.S.C. App. (Supp. I) §801 *et seq.* 14, 15

49 U.S.C. §11916 5

MISCELLANEOUS:

S. Rep. No. 44, 80th Cong., 1st Sess. (1947) 13

H.R. Rep. No. 1100, 80th Cong. 1st Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News, 1844 ..... 8, 9, 13, 15

93 Cong. Rec. A3969 (1947) 9

Brief for the United States as *Amicus Curiae, In re Wheat Rail Freight Rate Litigation*, 759 F.2d 1305 (7th Cir. 1985) 17, 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-21

SQUARE D COMPANY AND BIG D BUILDING SUPPLY CORP.,
Petitioners,

v.

NIAGARA FRONTIER TARIFF BUREAU, INC., *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

REPLY BRIEF FOR THE PETITIONERS

INTRODUCTION

Respondents assert that permitting shippers to maintain an antitrust action to recover damages for price fixing conspiracies outside of the confines of the Interstate Commerce Act somehow would constitute judicial interference with the Act. If respondents' fallacious argument were accepted, shippers who are entitled to protection against excessive rates would be unable to recapture overcharges resulting from

activities designed to deprive the shippers of the statutory protection to which they are entitled. Pious assertions by tortfeasors about the need to protect the integrity of a regulatory plan are unconvincing since permitting shippers to recover for illegal overcharges would not frustrate the integrity of the regulated plan but contribute to it.

Respondents also dispute that the protection for joint rate-setting permissible under the Interstate Commerce Act depends upon compliance with the statute which affords them an exception to the Congressionally mandated policy of open price competition. Not only do the respondents deny the *quid pro quo* of compliance with a regulatory plan in order to obtain its benefits, but they fail to offer any reason why public policy should not require that those who intentionally violate a regulatory plan be answerable under the prevailing laws of the United States for such unapproved or unauthorized conduct.

Respondents suggest that because the United States may bring a criminal case or a civil action to enjoin continuing violations damage actions are not necessary to deter regulatory violations.[1] This argument

[1] Recovery under the antitrust laws for illegal overcharges is available in both regulated and non-regulated industries even though the United States may file civil or criminal actions relating to the same activities. Dual liability serves two salutory purposes. Prosecution by the government is necessary to enforce the laws of the United States and to insure compliance with them. The availability of complementary damage actions by persons injured by illegal conduct compensates the victim and helps to prevent unjust enrichment of the conspirators. Congress intended that government and private actions be mutually reinforcing.

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to anyone contemplating business behavior in violation of the antitrust laws.

Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). *See also Illinois Brick Co. v. Illinois.*, 431 U.S. 720, 746 (1977), which refers to the legislative purpose in creating private rights to enforce the antitrust laws:

> But § 4 [of the Clayton Act] has another purpose in addition to deterring violators and depriving them of "the fruits of their illegality," *Hanover Shoe,* 392 US at 494; it is also designed to compensate victims of antitrust violations for their injuries.

assumes that the carriers should be permitted to retain significant sums collected pursuant to an illegal endeavor and that the victims of the conspiracy should suffer economic loss.

Even more remarkable is the respondents' attempt to speak on behalf of an agency they have defrauded, when the agency itself is represented in these proceedings and has disclaimed any adverse effect on its operations from permitting injured shippers to recover damages.

I. Recovery Of Damages From Companies Which Violate Both ICC Regulations And The Antitrust Laws Does Not Infringe Upon A Regulatory Plan

Respondents' assertion that permitting shippers to maintain damage actions against carriers for conduct which Congress has forbidden would constitute the substitution of a court's judgment for that of the ICC is erroneous in several respects. First, of course, the damages would relate to conduct which the ICC had no authority to permit (such as the coercive suppression of the right of competing carriers to file inde-

pendent tariffs or respondents' surreptitious price manipulations which the ICC never had an opportunity to review).

Second, permitting damages based on *past* conduct does not conflict with the ongoing regulatory function of a transportation agency. This Court has held that:

> The award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission.

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 222 (1966).

Third, it has been held repeatedly that conduct which violates a regulatory plan already is subject to antitrust damage actions when such suits are brought by competitors. *See, e.g., MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983); *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984); *City of Mishawaka v. Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), *cert. denied*, 436 U.S. 922 (1978). The maintenance of such suits has had no adverse effect on either the public interest or on the operations of the interested regulatory agency. If suits by competitors flowing from illegally derived tariffs do not infringe a regulatory plan, then neither would similar suits by customers of regulated entities. The economic determinations necessary to fix the amount of damages in actions brought by customers will be similar to the determinations made in actions brought on behalf of competitors of the regulated entities.

Fourth, and most persuasive, the ICC itself has disclaimed any adverse effect on its regulation if the shippers' suits are allowed to proceed.

> The availability of private damage actions would in fact *further the regulatory objectives of* both the Sherman Act and *the Interstate Commerce Act*. (Emphasis added.)

Brief for the United States as *Amicus Curiae* Supporting Petitioners, p. 6, signed by the ICC and the Department of Transportation.

II. Petitioners Did Not Receive The Rate Protection To Which They Were Entitled

Respondents argue that because they charged the "legal" rate, they charged a fair rate. They ignore the fact that the rates they charged became the so-called "legal" rates only because the carriers duped the ICC. When the setting of a rate violates the Sherman Act and the Interstate Commerce Act, the filed rates should be considered illegal rather than legal.[2]

On page 11 of their Brief, respondents seek to characterize the petitioners' complaints as nothing more than dissatisfaction with the "fair rates guaranteed [the shippers] by the ICA." But the petitioning shippers never had the protection of "fair" rates guaranteed by the ICA precisely *because* respondents subverted the statute.

---

[2] As used in the Interstate Commerce Act, 49 U.S.C. §11916, the term "legal" rate merely describes approved rates which carriers subscribing to a tariff must charge. It is equivalent to a "published" or a "filed" rate, but the fact that these rates are being collected does not mean that carriers should not be liable for damages occasioned by their fraudulent filings.

Likewise, the carriers' argument on page 11 that when shippers paid the secretly rigged rates they received ". . . exactly what they were entitled to under the ICA—rates governed by the statutory standards of the Act" is thoroughly defective. The shippers did not receive the rates to which they were entitled under Congress's regulatory design because the rates which these carriers charged were set in deliberate contravention of the standards of the Interstate Commerce Act. And since it was because of the calculated conduct of the respondent carriers that the ICA standards were not applied, it would be unjust for the carriers to profit by their violations at the shippers' expense.

The Court should note that in pursuing the argument that the ICC required respondents to charge the rates which they themselves had caused to be effective,[3] these respondents avoided any reference to this Court's holdings in *Canter v. Detroit Edison Co.*, 428 U.S. 579 (1976), discussed in petitioners' Brief, pp. 39 and 40, and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), cited by the United States. In those cases the Court permitted plaintiffs who paid regulated rates to maintain suits under the

[3] As noted in the Brief for Petitioners, page 14, proposed tariffs become effective 30 days after filing unless the ICC suspends them. The statistics show that the ICC simply cannot police effectively the volume of filings submitted to it. The Brief *Amicus Curiae* for the United States and the ICC confirmed that budgetary restrictions have impeded its ability to review tariffs to the extent that 99% of new rate filings go into effect automatically. The ICC is on record in this very action as supporting the antitrust damage remedy as a useful adjunct to its responsibility to prevent collusive and excessive rates from taking effect.

antitrust laws when those rates were the product of tariff filings made in connection with Sherman Act violations.

III. A Holding That *Keogh* Does Not Immunize Conduct Which Violates A Regulatory Plan Would Pose No Penalty For Carriers Which Comply With Federal Statutes And Regulations

Respondents' argument that the intended purpose of the *Keogh* doctrine is to prohibit judicial interference with ICA-regulated rates represents an attempt to misstate the question pending before the Court.[4]

[4] In addition to trying to change the issue presented, respondents attempt to overcome the allegations of the complaints, even though these allegations must be accepted for purposes of their motion to dismiss. In their counterstatement of the case, footnote four of their Brief, respondents state that they are not charged with "willful" or "knowing" violations of the Interstate Commerce Act even though the complaint alleges that the respondent carriers secretly set prices and threatened and coerced other carriers to refrain from posting lower rates. Not only were the violations both knowing and willful, but any suggestion that the respondents are the hapless victims of some technical dispute involving arcane regulations cannot be squared with the plain language of the complaint.

Respondents also transgress the ground rules pertaining to their own motion on page 41 of their Brief with the erroneous assertion that in this action "the liability issue turns on the construction of the rate bureau agreement. . . ." Respondents know better. The complaints allege conduct in clear violation of the NFTB rate agreement as well as conduct which the ICC is prevented by statute from approving. ICC construction of the agreement is not at all necessary to establish that price fixing by a secret "Principals Committee," undisclosed in the rate bureau agreement and unauthorized by the ICC, violates the law. Nor is any ICC construction necessary to determine that coercive suppression of independent rate filings in calculated defiance of

Petitioners do not claim that rates set in accordance with ICC procedures and approved by the agency are subject to antitrust damage claims.[5] The overcharges in question are the product of a secret and unauthorized pricefixing conspiracy and cannot be equated with rates approved by the ICC in compliance with its regulations and which are not challenged herein.

Conspiratorial rates do not represent rates set through proper application of agency expertise. Through respondents' design, the ICC has been deprived of the statutorily mandated opportunity to obtain the views of either shippers or would-be competitors of the respondents so that the application of a national transportation policy, receptive to both shippers' and carriers' interests, has been frustrated.

The House Report on the Reed-Bulwinkle Act states that the Interstate Commerce Commission may

---

the Reed-Bulwinkle Act constitutes unauthorized conduct which is not entitled to antitrust exemption.

[5] Likewise, in their *Amicus* Brief, the regional telephone companies distort the question before the Court. The issue according to the telephone companies is:

> Should the Court create a new class of lawsuits--treble damage actions by customers of federally regulated public entities who complain about the rates they are charged under effective tariffs?

The telephone companies surely understand that the question they pose is spurious and that petitioners have not attacked the principle that public utility rates may be set by federally regulated agencies pursuant to a statutory plan. The question involved is that of damages occasioned by conspiratorial circumvention of the regulatory plan and not a complaint about rates charged under tariffs filed in compliance with the regulatory plan.

approve rate bureau agreements if it "finds that, by reason of furtherance of the national transportation policy declared in the Interstate Commerce Act there should be relief from the antitrust laws."[6] The Report goes on to state that "the question as to whether or not an agreement is to be approved involves the accommodation and comparative evaluation by the Commission of two policies, the one, the national transportation policy, the other, the antitrust laws." H.R. Rep. at 1856. The Congressional intent that the Commission be able to make a comparative evaluation of the anticompetitive consequences of a rate bureau agreement or tariff is frustrated when secret conspiratorial activities deny the ICC the opportunity of fair evaluation.

Representative Bulwinkle himself explained that public involvement in all aspects of collective ratemaking was an essential ingredient of the antitrust immunity provisions being fashioned by Congress. He said:

> I read the other day the astonishing statement that 'the bill permitted carriers to get together in secret some dark night.' Needless to say this is absolutely incorrect. The bill provides *for complete publicity at every conference to protect the rights of the public*. 93 Cong. Rec. A3969 (1947) (extension of remarks, emphasis added).

The respondent carriers did exactly what Representative Bulwinkle said was forbidden. They convened in secret to fix rates and coerce would-be competitors

---

[6] H.R. Rep. No. 1100, 80th Cong., 1st Sess. (1947), *reprinted in* 1948 U.S. Code Cong. & Ad. News, 1844.

into withholding lower rate filings. Holding respondents responsible for this illegal conduct does not remove the immunity afforded ratemaking activity which is in compliance with the Act.

IV. Plaintiffs Seek To Recover For Damages Computed According To Accepted Principles Of Calculation Under The Antitrust Laws

Contrary to the assertion of respondents and certain *amici*, it is not at all necessary to recalculate each illegal rate pursuant to ICC procedures in order for petitioners to recover. The claim herein is one for damages under the antitrust laws, not for reparations. The measure of those damages is the difference between the conspiratorial rates actually charged and the competitive rate levels which would have been paid but for the illegal conspiracy. This type of calculation has been made in hundreds of antitrust cases affecting a wide variety of industries.[7]

A presumption should apply that competitive rates, credibly established through expert testimony, are within a zone of reasonableness. First, competitive rates are rates at which efficient carriers would earn a positive and non-predatory return and thus would qualify as reasonable. Second, carriers who subvert a regulatory plan should not be given an opportunity to invoke the same regulatory rules they have circumvented to reduce their liability. Any burden of showing that lower competitive rates would have been

[7] These include damage actions in regulated industries in actions brought by competitors; by shipper plaintiffs in *Carnation;* and by shipper plaintiffs in *In re Ocean Shipping Antitrust Litigation,* 500 F. Supp. 1235 (S.D.N.Y. 1980), recently settled. The trucking industry is hardly so unusual as to require a special method of calculating damages.

rejected by the ICC as unreasonably low should be borne by the party who violated the law and that burden should be a heavy one.[8]

In footnote 36 of their Brief, respondents refer to a number of government-originated antitrust actions relating to regulated industries for the proposition that government enforcement has been successful in curtailing regulatory abuse and, therefore, regulated entities do not need to face antitrust damage actions as an additional incentive to comply with the law. The cases cited (and additional cases brought by the government in regulated industries other than transportation) equally well support the proposition that massive violations of regulatory statutes occur with dismaying regularity. If the economic rewards which can be obtained through violating both a regulatory statute and the antitrust laws are large enough so that the violators are able to retain substantial illegal overcharges, it appears that the threat of government action, and particularly civil injunctive action, has been insufficient to deter illegal conduct. The threat of antitrust damage suits will assist in forestalling potential conspirators.

V. The Reed-Bulwinkle Act of 1948 Granted Express and Limited Immunity Which Obviated And Supplanted The Respondents' Need for Keogh Doctrine Protection

Petitioners argue that *Keogh* and the Reed-Bulwinkle Act addressed two different problems and that

[8] Moreover, in the highly unlikely event this burden is met, the damages then would be calculated as the difference between the *lowest* reasonable (i.e., non-predatory) rate levels and the rate levels obtained through the conspiracy.

Keogh does not immunize conduct but restricts the remedy available under the antitrust laws. In contrast to the issue presented in *Keogh*, the focus of the Reed-Bulwinkle Act, according to respondents, was to protect rate bureaus from criminal prosecutions. This construction of Reed-Bulwinkle is at plain odds with the language of the statute which grants a *limited express* immunity from the antitrust laws. The statute carefully spells out the immunity being granted and conditions that immunity upon compliance with the regulatory plan.

In essence, the respondents imply that immunity from treble damages under *Keogh* is not inconsistent with different limitations Congress placed on express immunity under the Reed-Bulwinkle Act. The basis of this argument is a supposition that the Reed-Bulwinkle Act protects against criminal and injunctive actions and not against treble damage actions which instead are foreclosed by *Keogh*. This view is incorrect. If *Keogh* is overruled, carriers nevertheless will be immune from treble damage actions under the immunity granted in the Reed-Bulwinkle Act *if* they meet the Act's requirements. Undoubtedly, carriers will continue to claim such statutory immunity from private damage actions for conduct which complies with Reed-Bulwinkle. The Act thus grants a comprehensive exemption for approved conduct which immunizes such conduct from both government prosecution and private damage actions. Accordingly, it supplanted the need for judicially implied immunity required in the *Keogh* situation.

The Court should note that respondents have made a misleading omission in quoting from the legislative history of the Reed-Bulwinkle Act by placing a period

after a *portion* of the Reed-Bulwinkle legislative history being quoted. Brief for Respondents, p. 29.[9] As a result of this deletion, they describe the House and Senate Reports as stating (albeit ambiguously) that the bill lets the antitrust laws apply with full force so far as they now are applicable.[10] Respondents' placing of the period at this point eliminates the exception clause which indicates that the *only* joint agreements among carriers being removed from the operation of the antitrust laws (including damage provisions) were agreements approved by the ICC based on its findings that antitrust relief should be granted. Proper reference to the exception clause indicates that unapproved or unauthorized conduct remained subject to the antitrust laws. Otherwise, the exception clause with its limitations would be superfluous. Brief for the Petitioners, pp. 24, 25.

---

[9] The full text of the quotation is:

> The bill leaves the antitrust laws to apply with full force and effect to carriers, so far as they are now applicable, *except as to such joint agreements or arrangements between them as may have been submitted to the Interstate Commerce Commission and approved by that body upon a finding that the object of the agreement is appropriate for the proper performance by the carriers of service to the public, that the agreement will not unduly restrain competition, and that it is consistent with the public interest as declared by Congress in the national transportation policy.* (Emphasis added on omitted portion.)

S. Rep. No. 44, 80th Cong., 1st Sess. (1947) at 7-8. The language of the exception clause in H.R. Rep. No. 1100 is quoted at Brief for the Petitioners, p. 24.

[10] Even this language most logically means that the antitrust laws apply to non-exempt or unapproved conduct.

VI. The *Carnation* Decision Recognizes That Implied Immunity No Longer Applies When Express Statutory Immunity Is Granted

Respondents argue that the Court's ruling in *Carnation* that

> The creation of an antitrust exemption for ratemaking activities which are lawful under the Shipping Act implies that unlawful ratemaking activities are not exempt.[11]

Carnation at 216, should not apply with respect to the Reed-Bulwinkle exemption. However, the principle of law enunciated by the Court in *Carnation* is fully applicable to the instant situation, and that principle has been reaffirmed by the Court on numerous occasions.

Respondents' argument rests on the premise that the regulatory plan of the Interstate Commerce Act and the Shipping Act are somewhat different in application. The legislative history of the Reed-Bulwinkle Act, however, refers specifically to Section 15 of the Shipping Act as a direct precedent for granting antitrust immunity to ICC-regulated carriers who operate within the confines of approved rate bureau

---

[11] With respect to respondents' argument that any and all relief for activities *outside* of the Interstate Commerce Act depends upon resort to the ICC, the Court noted in *Carnation* at 224:

> The rights which petitioners claim under the antitrust laws are entirely collateral to those which petitioners might have sought under the Shipping Act.

When, as a practical matter, no relief is available from the ICC, it is only proper that injured parties be allowed to pursue alternate remedies granted to them by Congress.

agreements. H.R. Rep. No. 1100, *supra*, 1948 U.S. Code Cong. & Ad. News 1844 at 1848 and 1849. Since Congress itself likened its extension of immunity in Reed-Bulwinkle to the type of immunity that was conferred by the Shipping Act, the holding in *Carnation* that unauthorized price fixing is subject to claims for redress from injured shippers applies with full force in this action.

VII. The Filed Rate Doctrine Should Not Apply To Affirmatively Fraudulent Conduct Which Violates *Both* The Regulatory Plan And The Antitrust Laws

Respondents argue that the filed rate doctrine through which the reasonableness of rates is measured by an expert agency should serve to prevent recovery of damages flowing from rates which were set in defiance of a regulatory plan and the antitrust laws. This Court has never agreed with the premise that conduct fraudulent on its face, indeed, conduct which constitutes a felony offense under the Sherman Act, is entitled to the protection of the filed rate doctrine. *See, Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). The result of such a holding would be to penalize shippers and to unjustly enrich carriers who successfully avoid agency review of their conduct.

Respondents cite a number of cases for the general proposition that a regulatory agency rather than a court should assume jurisdiction over rate-related disputes. Prior considerations of the filed rate doctrine, however, primarily involve disputes of statutory or regulatory interpretation. The regulatory uniformity which respondents claim is crucial to the filed rate doctrine, *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), *Arrow Transportation*

Co. v. Southern Railway, 372 U.S. 658 (1963), would not be impaired by leaving unapproved or unauthorized conduct subject to the ordinary application of the antitrust laws. Permitting shippers to recover for injuries inflicted *outside* of a regulatory scheme does not impinge upon either regulatory uniformity or an agency's exercise of its expertise.

Moreover, the ICC itself has denied that there is any infringement of its regulatory authority when damage claims are asserted for unapproved and unauthorized conduct. Brief for the United States as *Amicus Curiae*, p. 19. Indeed, there is a notable irony in having respondents, who subverted a regulatory plan, advance the proposition that requiring them to answer for damages they inflict would be inconsistent with the regulatory process.

VIII. The Brief of *Amici* American Information Technologies Corp., *et al.*, Poses An Artificial Question And The Brief Is Not Entitled To Any Weight

As noted, the telephone companies have attempted to distort the pending question by transposing it into a claim which is not being asserted. As *amici* and respondents know full well, neither petitioners (nor anyone else to their knowledge) intend to premise antitrust actions on *lawful* ratemaking activities (whether or not customers in regulated industries are dissatisfied with the rates which a commission has approved).

In addition to this threshold defect, the weight and credibility to be given to the brief as *amicus curiae* of the former AT&T system companies may be questioned if statements made by its principal signatory and counsel of record, J. Paul McGrath, are compared with statements he made while serving as Assistant

Attorney General in charge of the Antitrust Division. On June 26, 1984, Mr. McGrath was the principal signatory of a brief of the United States as *amicus curiae* in the *Wheat Rail Freight Rate Antitrust Litigation* appeal then pending before the court of appeals for the Seventh Circuit.

In his present *Amicus* Brief herein on behalf of the telephone companies at page 6, Mr. McGrath opines:

> In particular, Congressional action in passing the Reed-Bulwinkle Act and the Motor Carrier Act of 1980 more likely evidence acquiescence in, or ratification of, *Keogh*, than an intent to overrule it.

This argument may be contrasted with Mr. McGrath's immediately prior statement when he was employed by the United States in a policy-making capacity that:

> In this case [Wheat Rail Freight], however, it is not necessary to rely merely on general principles because, although the Reed-Bulwinkle Act expressly permitted collective rate-setting by carriers, *both the text of the Act and its legislative history make it clear that the scope of antitrust immunity for such activity was limited*, and that, in order to qualify for such immunity, carriers must operate in strict compliance with an ICC-approved rate bureau agreement. (Emphasis added.)

Likewise, the Court may wish to contrast Mr. McGrath's present argument, *Amicus* Brief, p. 6, that:

> Creating a treble damage action for users of federally regulated services would have a

> substantial negative impact on the regulatory process itself and on federally regulated firms.

with his statement at page 41 in the *Amicus* Brief for the *Wheat Rail Freight Rate Litigation* that:

> At a more general level, the thrust of the district court's reliance analysis contravenes the principle that antitrust immunities should be implied only in narrow circumstances, after clearly enunciating how the regulated entity is subjected to conflicting requirements, or how the statutory schemes clash in other ways. The court below failed to explain in any coherent manner how "the role of the ICC" would be "severely restricted." Imposing antitrust damage liability in cases of this sort would not deter carriers from filing rates with the ICC as required by law. And the ICC certainly has no regulatory obligation to protect carriers who fail to comply with statutory requirements.

IX. Respondents Were Not Entitled To Rely On *Keogh* As A Basis For Secret Cheating On A Regulatory Plan And, Accordingly, Public Policy Should Not Insulate Them From Recompensing Victims Through Prospective Overruling

Respondents' final argument is that they should be permitted to keep their illegal gains because an overruling of *Keogh* should be done through special legislation or limited to prospective relief only. Their plea to keep these overcharges should be rejected on several grounds.

Respondents were not acting in good faith reliance on a regulatory interpretation which they thought

complied with Congressional intent when they conspired to avoid the regulatory plan. They knew that their actions were in flagrant violation of both the antitrust laws and the Reed-Bulwinkle Act—and they took pains to conduct their conspiracy in secret. Unlike the situation in the *Southern Motor Carriers Rate Conference v. United States*, 105 S.Ct. 1721 (1985), which respondents cite, there has been no acquiescence, either by the ICC or by the judiciary, in the unlawful conduct.

Second, in 1948, Congress announced the conditions upon which carriers could obtain immunity when it passed the Reed-Bulwinkle Act. In the 1966 *Carnation* case, this Court specified that carriers are liable for antitrust damages to injured shippers for activities which do not comply with conditions for obtaining regulatory immunity. Respondents have had ample notice that they would not be entitled to immunity for unauthorized conduct.[12] It is contrary to public policy to reward or encourage knowing violations of the laws of the United States and no colorable argument can be or has been made that respondents believed that the anticompetitive activities challenged herein were protected by Congressional legislation.

---

[12] In its occasional references to *Keogh* since Reed-Bulwinkle was enacted in 1948, the Court has never acquiesed in conduct alleged herein nor given any indication that violations of both the ICA *and* the Sherman Act are immune from recovery of damages.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with directions that petitioners' complaints be reinstated in their entirety.

Respectfully submitted,

H. LADDIE MONTAGUE
ALAN M. SANDALS
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
215-875-3000

ARNOLD LEVIN
HOWARD SEDRAN
LEVIN AND FISHBEIN
320 Walnut Street
Philadelphia, PA 19106
215-592-1500

Attorneys for Petitioner
Big D Building Supply Corp.

DOUGLAS V. RIGLER*
KAPLAN RUSSIN & VECCHI
1218 Sixteenth Street, NW
Washington, DC 20036
202-638-0060

LINDA HELLER KAMM
MICHAEL FISCHER
FOLEY & LARDNER
1775 Pennsylvania Ave., NW
Washington, DC 20006
202-862-5300

JOSEPH E. ZDARSKY
KAVINOKY & COOK
120 Delaware Avenue
Buffalo, NY 14202
716-856-9234

Attorneys for Petitioner
Square D Company

**Counsel of Record*

February 20, 1986